

Varina Electric Co., Inc. and International Brotherhood of Electrical Workers, Local Union No. 666, AFL-CIO. Case 5-CA-22346

August 23, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On November 3, 1992, Administrative Law Judge Claude R. Wolfe issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting memorandum. The General Counsel also filed a motion to strike portions of the Respondent's cross-exceptions and the Respondent filed a motion in opposition to the motion to strike.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order, as modified below.

The judge found that the Respondent violated Section 8(a)(1) of the Act by threatening and interrogating employee Thomas Bresco and twice violated Section 8(a)(3) and (1), first by denying Bresco employment at an airport project and then by laying him off because he had engaged in protected union activity. There were no exceptions to these findings, and we adopt them.

In addition to the usual cease-and-desist order and notice to employees, the judge recommended that the Respondent remedy its unlawful conduct by making Bresco whole for any loss of earnings he suffered as a result of being denied employment at the airport project beginning on August 13, 1991. The General Counsel has excepted to the judge's failure to recommend a complete make-whole remedy, requiring the Respondent to offer Bresco reinstatement. We find merit in the General Counsel's exception.¹

¹ We deny the Respondent's cross-exception 1 to the judge's recommended make-whole order. The Respondent's memorandum provides no supporting factual or legal arguments. Rather, the memorandum attempts to introduce into the record alleged facts regarding pretrial settlement negotiations and the Respondent's asserted inability to satisfy a backpay award. We find that those portions of the memorandum concern evidence which is irrelevant to the issue of the appropriate remedy for the Respondent's unlawful conduct and that their admission would improperly augment the record contrary to Secs. 102.46(e) and 102.45(b) of the Board's Rules and Regulations. Accordingly, we grant the General Counsel's motion to strike paragraphs 1, 2, 4, 5, 6, and the conclusion of the Respondent's memorandum in support of its cross-exceptions and the corresponding exhibits (which were not included with the Respondent's submission to the Board).

We also deny the Respondent's cross-exception 2, in which it contends that the judge erred in not allowing the Respondent to "probe into the decision whether the discriminatee was a paid union organizer." The Respondent has not adverted to a specific ruling by the

The issue whether the Respondent would have retained Bresco or laid him off at the conclusion of the airport job was not litigated during the hearing. Accordingly, the General Counsel contends, and we agree, that *Dean General Contractors*, 285 NLRB 573, 573-574 (1987), controls this case. In *Dean*, the Board rejected a presumption that employees in the construction industry are terminated following completion of a job, despite the unique, job-by-job employment patterns that are characteristic of some companies in the industry. The Board ordered the respondent in *Dean* to undertake the traditional make-whole remedy with the understanding that, since the question had not been litigated below, the respondent could introduce evidence at compliance regarding the likelihood of the dischargee's transfer or reassignment to other projects subsequent to the job from which he had been unlawfully discharged. Id. at 575.

Accordingly, we shall order the Respondent to offer Thomas Bresco reinstatement to the same or substantially equivalent employment at other projects of the Respondent, without prejudice to the Respondent's raising its arguments in this respect during the compliance stage of these proceedings.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondent, Varina Electric Co., Inc., Richmond, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Offer Thomas Bresco immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision."

2. Substitute the attached notice for that of the administrative law judge.

judge, and we cannot discern the Respondent's precise concern from our reading of the record. Further, we note that during direct examination of Union Business Agent Sweeney, the General Counsel asked whether the Union paid Bresco any wages while he was employed by the Respondent, and Sweeney responded "no." The Respondent did not cross-examine Sweeney on this point. Even if Bresco had been a paid union organizer at the time he obtained work with the Respondent, that fact, alone, would not affect his status as an employee entitled to the protections of the Act. *Sumland Construction Co.*, 309 NLRB 1224 (1992).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT lay off or deny employment to employees, or otherwise discriminate against them in any manner with respect to their tenure of employment or any term or condition of employment because they support International Brotherhood of Electrical Workers, Local Union No. 666, AFL-CIO or any other labor organization.

WE WILL NOT threaten employees with any kind of retaliation because they engage in union activities.

WE WILL NOT coercively interrogate employees concerning their union activities or desires.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Thomas A. Bresco immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from our denial of employment and layoff, less any net interim earnings, plus interest.

VARINA ELECTRIC CO., INC.

Bruce F. Goodman, Esq., for the General Counsel.
Elizabeth G. Stevens, President, Varina Electric Co., Inc.
Charles B. Sweeney, Assistant Business Manager, Local 666.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Richmond, Virginia, on July 22 and August 24, 1992, pursuant to charges filed on October 25, 1991,¹ and complaint issued on January 31,

¹ All dates are 1991 unless otherwise indicated.

1992, and amended at hearing alleging an unlawful failure to transfer Thomas A. Bresco to another jobsite and subsequently laying him off, one unlawful threat, and an unlawful interrogation. Respondent denies the commission of unfair labor practices.

On the entire record, and after considering the comparative testimonial demeanor of the witnesses and the arguments of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Virginia corporation with an office and place of business in Richmond, Virginia, is engaged in industrial and commercial electrical contracting. During the 12 months preceding the issuance of the complaint, a representative period, Respondent purchased materials and supplies valued in excess of \$50,000 from firms located in the State of Virginia which received the materials and supplies directly from outside the State of Virginia. Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES²

At the urging of Charles Sweeney, assistant business manager and organizer for the Charging Union, Thomas Bresco, an unemployed electrician, filed an application for employment with Respondent on July 9, 1991.³ In addition to the simple fact Bresco was in need of employment, he and Sweeney agreed that he would try to get on an airport project Respondent was about to start for the purposes of monitoring compliance with wage levels required by the Davis-Bacon Act and to organize for the Union while so employed.

Several days after he filed his application, on or about July 15,⁴ Bresco was interviewed by Elizabeth Stevens, Respondent's president. She explained that there was no work then available. The two agree that Stevens encouraged Bresco to make frequent telephone checks to see if a vacancy occurred. Thereafter until July 31 he called several times a week. During this period there was some conversation about hiring for the airport job within a few weeks, but no promise of employment at the airport was made by Stevens during this period. Stevens acknowledges however that Bresco did express great interest in working at the airport. Finally, on or about July 31, Stevens offered Bresco a job as a helper at \$8 an hour on a job at the Regency Mall in Richmond, Virginia. Bresco accepted, but told Stevens it would only be temporary

² The facts found are in large part based on the credible testimony of Thomas Bresco which is uncontroverted except for rather generalized denials, and appeared to be an earnest account of the facts as he recalled them. His recitation is not improbable and is believable.

³ Bresco is credited that he filed the application with a female employee in Respondent's office named Pat.

⁴ All dates are 1991. Bresco places the interview on July 13. Stevens puts it on July 15.

until the airport job started. According to Bresco, Stevens agreed that he would go to the airport job within a few days of August 17, starting at \$12 an hour and then cutting back to \$11 an hour. Stevens remembers that when she first interviewed Bresco he had said he wanted an \$11 wage. She denies there was any understanding he would go to the airport job, but recalls Bresco had indicated during her first meeting with him that the airport job sounded very good to him. Stevens was as credible as Bresco in terms of demeanor, but the conversation between them on or about August 23, of which more later, in which she acknowledged such an agreement persuades me that there was an understanding between Stevens and Bresco on July 31 that Bresco would be employed on the airport job as an electrician when the work there commenced.

Bresco then worked on the Limited Store job at Regency Mall under the direct supervision of Robert Chaffinch, foreman. On the morning of August 1, Bresco was given directions to the jobsite by Mitchell Guidt, Respondent's operations manager and a supervisor and agent of Respondent within the meaning of Section 2(11) and (13) of the Act. During this meeting Guidt told Bresco that the fact Bresco was a union member would cause no problem, but added that Charles Sweeney had been at the airport sticking his nose into a Davis-Bacon job where it did not belong. Bresco asked what that had to do with him. Guidt rejoined that if Sweeney came to the job again Bresco would find out.⁵ As the complaint alleges, this last statement of Guidt that Bresco would find out what Sweeney's presence had to do with him was a threat of unspecified action against Bresco if Sweeney returned to the jobsite and reasonably tended to interfere with, restrain, and coerce Bresco (whom Respondent knew to be a union man from the stickers on his vehicle and his union membership receipt which he had previously presented to Stevens) in the exercise of his rights guaranteed in Section 7 of the Act and therefore violated Section 8(a)(1) of the Act.

When Bresco arrived at the job on August 1, he reported to Chaffinch. The two agree that thereafter Bresco handed out union literature during his nonworking time. Chaffinch reported this to Stevens and received no instructions to hinder this activity. To the contrary, Jonathan Snelson, who supervised Chaffinch after Guidt became involved in preparations for the airport work, instructed Chaffinch that Bresco was free to pass out literature on his own time. In addition to literature distribution, Bresco solicited employees to support the Union, gave them the Union's phone number, gave their names and phone numbers to Sweeney, and accompanied union agents on at least one weekend recruiting visit to an employee of Respondent. All of this conduct was well known to Respondent. Morris Davis, construction foreman for the general contractor on the Regency Square job, advised Stevens that Bresco was walking around the job organizing for the Union on his breaks, at lunch hour, and after work. Stevens responded that she did not approve of Bresco's organizing on the job but she would soon be laying people off in any event because that job would soon be completed.

⁵ Bresco's account of this meeting with Guidt is uncontroverted and credited.

On August 13, Bresco heard from Snelson that the airport job had started. It appears from the testimony of Guidt that it started that very day. Bresco immediately called Stevens and asked when he would be sent to the airport job. Stevens asked if it was true Bresco had asked Morris Davis for permission to bring Sweeney on the job to organize. Bresco denied it was true. Stevens advised she had decided it was in her best interests to leave him where he was for the time being. The complaint alleges the questioning of Bresco by Stevens concerning his efforts to bring Sweeney on the job violated Section 8(a)(1) of the Act. I conclude the allegation is well-founded. This questioning is distinguishable from permissible general inquiry concerning the union sympathies of an employee who publicly parades his allegiance to a union cause⁶ because although it is true Bresco was openly organizing for the Union, and Stevens' question concerned an aspect of that conduct, it is also true that Bresco had been warned by Guidt of possible retaliation against him if Sweeney reappeared on the jobsite. Stevens' inquiry objectively viewed in context with Guidt's prior warning reasonably tended to convey to Bresco the message that Respondent was checking to see if he had heeded Guidt's warning. In these circumstances a conclusion that Stevens' question tended to interfere with, coerce, and restrain Bresco in the pursuit of his union organizing activities is warranted.

On or about August 19, Bresco again called Stevens, inquired about the airport job, and was told he would not be sent to the airport at that time.

On or about August 23, Bresco called Stevens from a speakerphone in the Union's office with Sweeney listening in. Stevens was not made aware of Sweeney's presence. Bresco reminded Stevens they had agreed she would send him to the airport, and pointed out he had not yet been so assigned. Stevens concurred they had had that agreement, but added that she had changed her mind and was not sending him to the airport. Bresco was never sent to the job, but continued to work at Regency Square.

On August 27, Bresco suffered an on-the-job injury. He was advised by a physician not to work for a couple of days. On August 28, Bresco called Chaffinch and told him that he would be off for a day or two. Chaffinch told him not to return to that job but to call the shop when ready to return. Later that day Bresco called Stevens. She advised that she had cut back the work force on the Regency Square job. Bresco asked if he was laid off or fired. To each she said he was not. He persisted by asking if he was on furlough. When she professed not to know what that meant, he asked if he was in limbo. She replied that was a good way to describe it. That same day Bresco filed a claim for unemployment compensation with the Virginia Employment Commission giving "Lack of Work" as the reason for his separation.

On or about September 27 or 28, Bresco telephoned Stevens. When she answered the phone she asked if Bresco appreciated that she had given him a job. Receiving an affirmative answer, she asked why Bresco was trying to put her out of business. Bresco professed not to know what she was talking about. Stevens again accused Bresco of trying to destroy her business. He denied the accusation. She said, "Thank you very much," whereupon Bresco hung up. He called again later that day and asked if he was still employed by

⁶ *Rossmore House*, 269 NLRB 1176 (1984).

Respondent. Stevens said she supposed not. Bresco persisted by asking if he was laid off or fired. Stevens' reply was to the effect Bresco could put down whatever he wanted to on whatever form he next filed,⁷ and she would react appropriately. The original charge in this case was filed with the Board by the Union on October 25, 1991.

I have found that there was an understanding between Stevens and Bresco on July 31 that he would be employed as a helper until the beginning of work at the airport, at which time he would be employed there as an electrician. I am persuaded however that Stevens changed her mind about carrying through with that understanding when she was advised Bresco was actively engaged in organizational efforts among Respondent's employment. This change of mind is clearly evidenced by her statement to Davis, which Davis places about a week before Bresco's layoff, that she did not approve of Bresco's organizing but there would soon be a layoff in any event. She was plainly advising Davis that Bresco would no longer be an employee when the Regency Square layoff occurred. This is persuasive evidence she had abandoned her previous intention to further employ Bresco at the airport and had done so because he was an active organizer for the Union. This conclusion is not placed in doubt by Respondent's employment of other union members because there is no evidence proffered or adduced that any employee other than Bresco actively and openly attempted on behalf of a union to organize Respondent's employees.

The General Counsel has shown that Respondent, by its president, agreed to hire Bresco as a helper and then employ him on the airport job when it began but then failed and refused to provide the airport employment after Respondent discovered and expressed opposition to Bresco's union organizing. With respect to that opposition, there is no evidence whatsoever of any reason other than Bresco's union activities for Respondent to accuse him of attempting to destroy the Company. An inference that opposition to Bresco's union activity was a motivating factor in the decision to deny him employment at the airport is appropriate.

Respondent asserts that (1) it placed advertisements in the newspapers for airport employees and hired its airport work force from those who applied at its airport office trailer; (2) at least 2 of those hired, of about 90 in all, were union members; (3) the work force averaged about 30; (4) Bresco did not apply at the airport; (5) no employees were transferred to the airport from other jobs; and (6) there were no promises to Bresco that he would be transferred. Items 1 through 4 were testified to by Respondent's witnesses and are not contested. Item 5 seems to be accurate but for the use of at least one employee from another job on a temporary emergency basis. Item 6 is not correct. Bresco was promised employment at the airport. Whether it be characterized as a transfer is a matter of semantics probative of nothing material to this case. With respect to the application at the airport bit, it is meaningless because Stevens had determined not to hire Bresco at the airport before the work there commenced. Moreover, Bresco was entitled to rely on her promise and had in effect already applied and been accepted for airport work by virtue of the agreement between him and Stevens. That being the case the burden fell on Respondent to advise

him he needed to file an application at the airport if Respondent wanted to tidy up its procedure. In this connection, Guidt, who did all the hiring at the airport, concedes he knew Bresco wanted to work at the airport. Even so, there is no evidence he ever told Bresco of any need to apply at the airport trailer. In any event, the requirement of filing a new application by an employee of less than a month who is already on the payroll and promised the new work strikes me as an inartistic effort to conjure up a reason to justify Respondent's conduct toward Bresco. There is no persuasive evidence that Bresco was not a capable electrician, and Respondent has not presented a single convincing reason for not hiring him at the airport. That no other employees were directly transferred to that job proves nothing because there is no showing anyone but Bresco was promised a transfer, and because Respondent could easily have arranged the hire of Bresco through whatever procedure it required if it had wished to abide by its original promise to Bresco. There is no need to further belabor the point that Respondent has not shown by a preponderance of the evidence that Bresco would have been denied airport employment absent his union activism. Accordingly, I find the General Counsel has proved by a preponderance of the evidence that since on or about August 13, 1991, the date the airport work commenced,⁸ Respondent denied Thomas Bresco employment at that location because he engaged in protected union activity.⁹ That denial violated Section 8(a)(3) and (1) of the Act.

Turning to the allegation that Bresco was unlawfully laid off on August 27, 1991, and taking note that had Respondent abided by its agreement he would have been employed at the airport by then, Bresco's layoff at Regency Square occurred when Chaffinch advised him on August 28 not to return to that site but to contact the office for further job assignments. When Stevens told Davis that she did not approve of Bresco's organizing but there would soon be a layoff, thereby implying Bresco would soon be laid off and his organizing would therefore end, she there and then preselected Bresco for the first layoff at Regency Square Mall which was expected to be very soon. Chaffinch's testimony that selections for layoff were made by the office confirms my conclusion Stevens made the selections for layoff. Chaffinch recalls, as does Davis, that Respondent had as many as 14 employees on that job at one time. Chaffinch further recalls that four or five other employees were laid off within a week of Bresco's layoff due to lack of work. Davis confirms several employees were laid off with Bresco. The need for a layoff is not contested. The selection of Bresco is the real issue. Respondent does not explain why he was selected for that first layoff. Chaffinch and Davis credibly relate that the Regency Square job ended several weeks after Bresco's layoff. Davis recollects there were about four Varina employees still at the job when it ended.

Respondent's hostility toward Bresco's organizing, its unlawful refusal to honor its agreement to employ him at the airport, and his preselection for layoff because he was organizing are more than enough to infer that his union activity was a motivating consideration in selecting him for layoff. Inasmuch as Respondent advances no colorable reason for

⁷ This remark, I find, had reference to the fact Bresco had earlier filed for unemployment compensation.

⁸ *Wright Line*, 251 NLRB 1083 (1980), *enfd.* *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981).

⁹ Guidt advises the job ended the first of November 1991.

preselecting Bresco for the layoff, I find the inference of unlawful selection in violation of Section 8(a)(3) and (1) of the Act has not been rebutted by a showing he would have been selected absent his organizing activities and the General Counsel has therefore shown said violations occurred by a preponderance of the credible evidence. I further find the announcement by Chaffinch on August 28 that Bresco should not return to the job fixes August 28 as the date of his lay-off.

CONCLUSIONS OF LAW

1. Respondent, Varina Electric Co., Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Brotherhood of Electrical Workers, Local Union No. 666, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening an employee with unspecified retaliation if a union agent visited the jobsite, Respondent violated Section 8(a)(1) of the Act.

4. By coercively interrogating an employee concerning his union organizing efforts, Respondent violated Section 8(a)(1) of the Act.

5. By denying Thomas Bresco employment at an airport project because he engaged in protected union activity, Respondent violated Section 8(a)(3) and (1) of the Act.

6. By laying Thomas Bresco off because he engaged in protected union activity, Respondent violated Section 8(a)(3) and (1) of the Act.

7. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In addition to the usual cease and desist order and notice posting requirements, my recommended order will require Respondent to make Thomas A. Bresco whole for any loss of earnings he may have suffered by not being employed as an electrician at Respondent's airport project from August 13, 1991, until that project's completion, said backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Although in normal circumstances Thomas A. Bresco would be entitled to be made whole for wages lost as a result of his layoff, such an order is unnecessary in the instant case because Bresco will be made whole at a higher rate of pay for the failure to employ him at the airport for a period of time encompassing the lesser period of time Bresco could possibly have worked at the Regency Square Mall job until its completion. If, however, the Board not find the failure to employ at the airport unlawful then he must be made whole for wages lost due to his layoff, said backpay with interest to be computed in the same manner as previously described above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, Varina Electric Co., Inc., Richmond, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in or activities on behalf of International Brotherhood of Electrical Workers, Local Union No. 666, AFL-CIO, or any other labor organization by laying off or denying employment to employees or by otherwise discriminating in any manner in respect to their tenure of employment or any term or condition of employment.

(b) Threatening employees with retaliation if union agents visit Respondent's jobsites.

(c) Coercively interrogating employees concerning their union activities.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Thomas A. Bresco whole for any loss of wages he may have suffered by reason of the discrimination against him in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its business office and current construction projects copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."